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8 POLAVAA N.,
9 Plaintiff,
10 v.
11 KILOLO KIJAKAZI, et al.,
12 Defendants.

Case No. 23-cv-02699-RMI

**ORDER RE: CROSS MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 16, 19

13 Plaintiff seeks judicial review of an administrative law judge (“ALJ”) decision denying her
14 application for disability benefits under Title II of the Social Security Act. *See* Admin. Rec. at
15 2468.¹ The Appeals Council of the Social Security Administration declined to review the ALJ’s
16 decision. *Id.* at 2438. As such, the ALJ’s decision is a “final decision” of the Commissioner of
17 Social Security, appropriately reviewable by this court. *See* 42 U.S.C. § 405(g), 1383(c)(3). Both
18 parties have consented to the jurisdiction of a magistrate judge (dkts. 10, 11) and both parties have
19 moved for summary judgment (dkts. 16, 19). For the reasons stated below, Plaintiff’s Motion for
20 Summary Judgment is GRANTED IN PART and Defendant’s Cross-Motion for Summary
21 Judgment is DENIED.

LEGAL STANDARDS

22 The Social Security Act limits judicial review of the Commissioner’s decisions to final
23 decisions made after a hearing. 42 U.S.C. § 405(g). The Commissioner’s findings “as to any fact,
24 if supported by substantial evidence, shall be conclusive.” *Id.* A district court has limited scope of
25 review and can only set aside a denial of benefits if it is not supported by substantial evidence or if
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28 ¹ The Administrative Record (“AR”), which is independently paginated, has been filed in nine
attachments to Docket Entry #12. *See* Dkts. 12-1 through 12-21.

1 it is based on legal error. *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir.
2 1995). The phrase “substantial evidence” appears throughout administrative law and directs courts
3 in their review of factual findings at the agency level. *See Biestek v. Berryhill*, 139 S. Ct. 1148,
4 1154 (2019). Substantial evidence is defined as “such relevant evidence as a reasonable mind
5 might accept as adequate to support a conclusion.” *Id.* at 1154 (quoting *Consol. Edison Co. v.*
6 *NLRB*, 305 U.S. 197, 229 (1938)); *see also Sandgathe v. Chater*, 108 F.3d 978, 979 (9th Cir.
7 1997). “In determining whether the Commissioner’s findings are supported by substantial
8 evidence,” a district court must review the administrative record as a whole, considering “both the
9 evidence that supports and the evidence that detracts from the Commissioner’s conclusion.”
10 *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). The Commissioner’s conclusion is upheld
11 where evidence is susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400
12 F.3d 676, 679 (9th Cir. 2005).

13 BACKGROUND

14 This case is over a decade old. *See* AR at 120 (initial administrative denial of Plaintiff’s
15 Social Security benefits took place in 2013). It has produced three ALJ decisions, each of which
16 has been appealed to the district court. Two of those appeals—to Judge Maria-Elena James in
17 2018 and to Judge Jacqueline Corley in 2021—resulted in remand with instructions to reevaluate,
18 among other things, the opinion of Dr. Katherine Wiebe, who performed a series of psychological
19 tests on Plaintiff in 2015, and whose resulting opinion was improperly discounted in the first two
20 ALJ opinions.

21 Plaintiff alleges that she suffers from depression and anxiety as well as diabetes, back pain,
22 obesity, and other physical impairments.² On remand following Judge James’s decision, the ALJ
23 determined that Plaintiff became disabled on November 1, 2017, due to her physical conditions,
24 but that she had not been disabled earlier. AR at 1844, 1846. Plaintiff appealed this result to
25 Judge Corley, who again remanded with instructions to reevaluate much of the evidence, including

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27 ² The Court will not endeavor to comprehensively summarize the 3,214-page record in this matter.
28 Readers unfamiliar with the case’s factual and procedural history may wish to review the previous
decisions: *Noa v. Berryhill*, 2018 WL 1696819 (N.D. Cal. April 6, 2018); and *Polavaa N. v. Saul*, 2021 WL
1118074 (N.D. Cal. March 24, 2021).

1 Dr. Wiebe's testimony, which had been improperly discounted. *Id.* at 2573–74. On remand
2 following that decision, the ALJ again discounted Dr. Wiebe's testimony on a variety of grounds.
3 *Id.* at 2476–78. On appeal to this Court, Plaintiff argues (among other things) that the ALJ's latest
4 failure to credit Dr. Wiebe's opinion was unjustified. Because the treatment of Dr. Wiebe's
5 opinion is dispositive on the issue of remand, this Order will focus on that issue.

6 ANALYSIS

7 Due to the age of this case and the time period for which benefits are requested, the
8 medical evidence in the record will be analyzed under a since-superseded standard which takes
9 into account the relationship between the patient and the doctor rendering an opinion. For
10 purposes of this case, therefore, “[t]he opinion of an examining doctor, even if contradicted by
11 another doctor, can only be rejected for specific and legitimate reasons that are supported by
12 substantial evidence in the record,” and the ALJ “must provide ‘clear and convincing’ reasons for
13 rejecting an uncontradicted opinion of an examining physician.” *Lester v. Chater*, 81 F.3d 821,
14 830–31 (9th Cir. 1995). The Court will take the ALJ's reasons for discrediting Dr. Wiebe's report
15 in turn.

16 a. *Lack of Record Evidence and Inference of Bias*

17 The ALJ found that “the overwhelming evidence from the treatment records shows no
18 mental health symptoms, and the only evidence of any mental health impairment is the report from
19 the psychologist retained by the claimant's representative, Dr. Wiebe, to help support the SSI
20 application[.]” AR at 2476. The Court finds no substantial evidence to support this assertion.

21 The ALJ made much of the fact that Plaintiff's disability claims did not mention mental
22 illness until she engaged new representatives, who hired Dr. Wiebe to examine Plaintiff “as they
23 routinely do”. AR at 2476. However, the mere fact that Dr. Wiebe was engaged by Plaintiff is not
24 a proper ground on which to discount her findings. “An examining doctor's findings are entitled
25 to no less weight when the examination is procured by the claimant than when it is obtained by the
26 commissioner.” *Lester*, 81 F.3d at 832.³ The Court is aware that the Commissioner, too,

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28 ³ Besides being the law of the Ninth Circuit, this principle is the law of this case. AR at 1946
 (“Absent evidence undermining the credibility of Dr. Wiebe's report, the fact it was obtained based on

1 “routinely” hires consultative examiners, and has not previously noted ALJs to discount the
2 opinions of the Commissioner’s examiners on the basis of this practice. Accordingly, this is not a
3 legitimate reason to discount Dr. Wiebe’s analysis.

4 Further, while the ALJ concluded that Dr. Wiebe’s report represented the only evidence of
5 a mental health impairment, the record prior to Plaintiff’s October 2015 evaluation by Dr. Wiebe
6 shows otherwise:

- 7 • Home healthcare providers who treated Plaintiff in late 2012 and early 2013 following her
8 hysterectomy reported symptoms of depression. One said that Plaintiff “easily gets upset
9 but tried to calmed [sic] down to manage emotion”. AR at 785. Another recorded that
10 Plaintiff had not been eating regularly and did not have an appetite; the same day, a third
11 provider noted that Plaintiff “seemed depressed [but] motivated to get better”. *Id.* at 818,
12 888. In February 2013, a home health nurse noted that Plaintiff “appears depressed, but
13 denies when asked” and scored a 0 on a depression questionnaire. *Id.* at 990–91. By the
14 next month, however, her score had increased to a 2, with a score of 3 or higher needing to
15 be reported back to the hospital. *Id.* at 1048. Treating notes from the home health service
16 indicate that Plaintiff had “moderate to severe depression”. (902).
- 17 • Dr. Brooks, Plaintiff’s oncologist, noted in early January 2013 that Plaintiff was “[f]eeling
18 sad given difficulty with wound and slow healing process.” AR at 679. A week later, Dr.
19 Brooks elaborated that Plaintiff “has very flat affect, appears to be depressed. Symptoms
20 and treatment options discussed at length. Patient declined interventions and reported she
21 would call our office if she felt she needed help.” *Id.* at 708. Subsequent visit notes also
22 reflect depression, as well as the fact that Plaintiff “denied pharmacological intervention
23 and feels she has good support.” *Id.* at 454, 530, 547, 700. Over the next year, although
24 Plaintiff reported her mood was stabilizing, Dr. Brooks noted specific symptoms of
25 depression, including a flat affect and weight gain. *Id.* at 1197–98, 1283, 1330.
- 26 • Plaintiff discussed disordered eating and suicidal ideation, both symptoms of depression,

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28 Plaintiff’s request is not a legitimate reason for rejecting it.”).

1 with her primary care provider in February 2013. AR at 330. She also complained of
2 another depression symptom, fatigue, in 2014 and 2015. *Id.* at 1342–43, 1580. At one
3 point, Plaintiff said that she was too sleepy to check her blood sugar regularly. *Id.* at 1580.

4 • At least two separate healthcare providers in 2014 noted Plaintiff as either experiencing or
5 having experienced depression. AR at 1806 (during evaluation for leg and back pain in
6 January 2014), 1603 (intake for a new medical provider in August 2014).

7 The ALJ noted that he did not credit Dr. Wiebe’s analysis because other doctors had
8 observed Plaintiff to have a normal affect and mood and no psychological or behavioral
9 symptoms: “Certainly, if the claimant were experiencing significant mental health symptoms
10 during this time, someone would have picked up on it.” AR at 2476. As noted *supra*, however,
11 several different providers *did* pick up on it. Further, the other doctors the ALJ mentions were not
12 performing full psychological evaluations, but rather making cursory observations relating to
13 Plaintiff’s mood, affect, and behavior as part of the intake process before treating her for a
14 physical condition. As Judge James noted, these observations were “made by . . . treating
15 physician[s] who d[id] not specialize in mental health and w[ere] examining Plaintiff for
16 [conditions such as] back pain[.]” *Id.* at 1945. Therefore, the ALJ’s determination that the record
17 does not reflect mental health symptoms during the time period at issue is not supported by
18 substantial evidence.

19 b. *Effect of Non-Severe Findings*

20 The ALJ noted that Dr. Wiebe’s report contained many normal or near-normal findings
21 related to Plaintiff’s cognitive functioning: “mild to moderate impairment in memory, minimal
22 impairment in executive functioning, and no impairment in attention and concentration[.] The
23 claimant’s functioning in the language domain and visual/spatial abilities domain was also
24 normal[.]” AR at 2476. But despite these normal findings, Dr. Wiebe “opined severe deficits in
25 short-term memory . . . and marked limitation on completing a workday or workweek without
26 interruptions from psychological symptoms.” *Id.* In the ALJ’s view, “[t]he doctor does not
27 adequately bridge the gap between minimal impairment in executive functioning and no
28 impairment in concentration and attention with a marled [sic] limitation in completing a workday

1 or workweek. This minimal, self-contradictory report does not overcome the voluminous
2 treatment record.” *Id.* at 2476-77. However, this Court finds that substantial evidence does not
3 support the ALJ’s assessment of Dr. Wiebe’s findings.

4 First, as Judge James noted in 2018, the “voluminous treatment record” against which the
5 ALJ weighs Dr. Wiebe’s findings as to Plaintiff’s memory and attention capabilities consists of
6 cursory observations by nonspecialists whom Plaintiff was seeing for other concerns. AR at 1945.
7 Second, as Judge Corley noted in 2021, the fact that Plaintiff has mild limitations in some areas
8 does not contradict the existence of severe impairments in others. *Id.* at 2573. Third, the one
9 contradiction the ALJ describes—mild to moderate impairment in memory, but a severe deficit in
10 short-term memory—is resolved by reference to Dr. Wiebe’s report, which says that although
11 Plaintiff is able to learn information with repetition and memory cues, she scored extremely low
12 (well below the first percentile) for immediate memory. *Id.* at 1652.

13 Fourth, Dr. Wiebe’s evaluation indicates several psychological symptoms which could
14 interrupt the workday or workweek: “she frequently behaves incompetently and disconsolately,
15 thereby driving others away”, *id.* at 1656; she “may be apprehensive about trivial matters”, *id.* at
16 1657, or “act in a petulant and self-pitying manner”, *id.* at 1655; “[h]er discontent and moodiness
17 frequently invoke critical if not humiliating reactions from others”, *id.* at 1656; and “a rather
18 innocuous critical remark may set into motion obsessive worrying and brooding”, *id.*
19 Significantly, Dr. Wiebe also noted that Plaintiff suffered from depressive fatigue. *Id.* at 1650. In
20 short, “[h]er psychiatric and personality disorder problems . . . could affect her ability to relate to
21 and communicate effectively with others,⁴ including supervisors, coworkers, and the public, and to
22 adhere to the demands of a regular work schedule.” *Id.* at 1658.⁵ These symptoms, as Judge

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24 ⁴ The ALJ expressed doubt about this assertion, saying “[n]either Dr. Wiebe’s report nor Dr.
25 Martin’s report noted any difficulties getting along with the people she lived with”. However, this is
26 incorrect. Dr. Wiebe’s report says that Plaintiff “is socially isolated except for spending time with family
members, *with whom she experiences conflicts*” and that “[h]er though content tended towards concerns
about conflicted relations with family members.” AR at 1649–51 (emphasis added).

27 ⁵ The fact that “Dr. Wiebe described the claimant as cooperative, and stated she put forth good
28 effort during psychological testing,” AR at 2477, does not contradict this conclusion as the ALJ asserts it
does. Dr. Wiebe specifically found that Plaintiff could become moody, petulant, and incompetent due to
her mental illnesses. The fact that Plaintiff did not exhibit such symptoms during a three-hour examination

1 Corley noted, could interrupt the workday or workweek, and the ALJ did not appear to consider
2 these symptoms as potential supporting evidence, as Judge Corley directed him to on remand. *Id.*
3 at 2573. Accordingly, substantial evidence does not support the ALJ’s decision to discount Dr.
4 Wiebe’s conclusions based on the presence of normal function in some areas.

5 *c. Mention of Childhood Abuse*

6 The ALJ further attempts to discredit Dr. Wiebe’s report by stating that “while Dr. Wiebe
7 [sic] indicated the claimant ‘experienced being emotionally neglected and abused during her
8 childhood,’ she does not record that the claimant actually said that to her, and she did not diagnose
9 any trauma-related disorder.” AR at 2477. By contrast, per the ALJ, “Dr. Martin states plainly
10 that the claimant ‘denied a history of emotional, physical, or sexual abuse as a child.’ *Id.* To the
11 ALJ’s way of thinking, “[t]his further undermines the reliability of Dr. Wiebe’s [sic] report.” *Id.*
12 However, Dr. Wiebe did not simply assert out of the blue that Plaintiff had been maltreated as a
13 child; her report noted that Plaintiff’s “grandmother disliked her and made her do all the
14 household chores”. *Id.* at 1649. Indeed, Dr. Wiebe quoted Plaintiff as saying this treatment was
15 what first caused her to wish she was dead: “When I was living with my grandmother—probably
16 w[he]n 10 or 11 years old—just knowing the way you were treated . . . You felt like you where
17 [sic] treated differently. And it really didn’t help when your parents were not really there with
18 you.” *Id.* at 1653–54. The fact that Plaintiff did not use the word “abuse” in her description of her
19 childhood is an improper ground on which to discount Dr. Wiebe’s conclusion that Plaintiff was
20 abused. Further, the ALJ cites no authority for the proposition that all abuse victims suffer from a
21 trauma disorder or that the psychological effects of abuse are limited to trauma disorders to the
22 exclusion of depression and anxiety. With all that said, it is unclear why the ALJ credited Dr.
23 Martin’s brief note of a denial of abuse (which might have been the product of Plaintiff’s
24 unwillingness to discuss traumatic events or Plaintiff’s failure to recognize the conduct as abuse)
25 over the description of abusive conduct provided in Dr. Wiebe’s evaluation. Therefore, the

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27 does not mean that she would not exhibit such symptoms over an eight- or forty-hour interval in a more
28 stressful environment. The same holds true for similar observations made by other care providers. *See also id.* at 1945 (opinion of James, J.) (“The ALJ does not explain why even severe depression would prevent Plaintiff from being pleasant and cooperative during a medical appointment.”).

1 mention of Plaintiff being abused is not a legitimate ground on which to discount Dr. Wiebe's
2 opinion.

3 *d. Structured Environment Disclaimer*

4 The ALJ also faults Dr. Wiebe for having "asserted, without support or explanation, that
5 the claimant's ability to perform tasks under a structured assessment does not necessarily reflect
6 her performance in a regular work environment." AR at 2478. In the Court's experience,
7 however, this is a standard disclaimer included in many (if not most) evaluations of this type.
8 Such disclaimers restate the basic scientific principle that findings obtained from structured
9 experiments may not translate perfectly to the realities on the ground. The Court therefore finds
10 no substantial evidence supporting the following trail of logic by the ALJ:

11 It is unclear, then, what Dr. Wiebe viewed the point of these tests to be. If the
12 doctor, retained by counsel, finds such testing only of value in demonstrating
13 impairment but discounts if it [sic] without significant explanation if it
14 demonstrates lack of impairment, this weighs against giving any significant weight
15 to the opinion.

16 *Id.* at 2478.

17 *e. Adapting and Managing Oneself*

18 The ALJ asserts that the only evidence of Plaintiff having difficulty adapting or managing
19 herself is in Dr. Wiebe's report, "and that evidence is self-contradictory, at best." AR at 2478.
20 The ALJ characterized Dr. Wiebe as "vaguely" stating that Plaintiff had "some impairment in
21 reasoning, insight, and judgment associated with her psychiatric problems". *Id.* The ALJ found
22 this to be contradicted by the fact Plaintiff had presented to examiners with adequate grooming,
23 fair insight and judgment, and a cooperative attitude. *Id.* However, as discussed above, Dr. Wiebe
24 specifically concluded that Plaintiff was likely to act irrationally and counterproductively at times
25 due to her mental illness. Further, the record in this matter reflects several times where Plaintiff
26 has acted against her best medical interests due to her mental health symptoms. Most notably,
27 Plaintiff declined depression medication against medical advice because she was afraid of the side
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1 effects and convinced herself that she was not really depressed.⁶ *Id.* at 57–58, 1650. Accordingly,
2 substantial evidence does not support this reason for discounting Dr. Wiebe’s conclusions.

3 *f. Failure to Seek Treatment*

4 The ALJ weighed Plaintiff’s failure to seek mental health treatment against Dr. Wiebe’s
5 conclusions, stating that Plaintiff’s failure to seek psychiatric treatment and her treatment
6 providers’ failure to hospitalize her for depression “suggest[] that her treatment providers did not
7 view her mental health as a significant issue in her overall wellbeing.” AR at 2478. But to echo
8 Judges James’ critique of the first ALJ opinion in this matter, “Plaintiff’s lack of treatment for
9 depression does not provide a specific and legitimate reason to reject Dr. Wiebe’s diagnoses nor
10 her assessment of Plaintiff’s mental health impairments on her ability to perform work-related
11 tasks.” *Id.* at 2574. Judge James further quoted *Nguyen v. Chater* to decry the “questionable
12 practice to chastise one with a mental impairment for the exercise of poor judgment in seeking
13 rehabilitation.” *Id.* (quoting *Nguyen*, 100 F.3d 1462, 1465 (9th Cir. 1996)). And to echo Judge
14 Corley’s critique of the *second* ALJ opinion in this matter, which included a block quote of Judge
15 James’s original critique:

16 This remains equally true now. The ALJ cannot simply rely on Plaintiff’s failure
17 to obtain mental health treatment. *See Nguyen*, 100 F.3d at 1465 (“the fact that
18 claimant may be one of millions of people who did not seek treatment for a mental
19 disorder until late in the day is not a substantial basis on which to conclude that [the
20 doctor’s] assessment of the claimant’s condition is inaccurate.”).

21 *Id.* at 2574 (alterations in original). And so, to reiterate: the fact that Plaintiff did not accept the
22 help offered to her is not a reason to discount her mental illness symptoms. The fact that
23 Plaintiff’s treating providers did not (and likely could not) force her to accept such help does
24 nothing to alter this general principle. Accordingly, this was not a legitimate ground for
25 discounting Dr. Wiebe’s opinion.

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27 ⁶ There are other examples as well: At Plaintiff’s first Social Security hearing, she noted that she
28 declined pain medication despite experiencing “very much” pain because she was afraid of becoming a
drug addict. AR at 55. One nurse noted that Plaintiff was “concerned” at the prospect of being referred to
a specialized wound-care clinic for her slow-healing hysterectomy wound. *Id.* at 1051.

1 *g. Tentative Wording of Findings*

2 The ALJ also criticized Dr. Wiebe's report for containing too much conjecture. The ALJ's
3 opinion took issue with the tentative wording of some of Dr. Wiebe's conclusions: "She probably
4 believes that it is best to abdicate responsibility, to leave matters to others, and to place her fate in
5 others' hands"; "She may evince a diminished capacity for pleasure that may be accompanied by
6 sleep difficulties and a poor appetite that may indicate an anorexic pattern", "She yearns for
7 acceptance and affection from others, but her hopes appear to be waning rapidly". AR at 2478
8 (emphasis by ALJ). The ALJ called this "poetic boilerplate" which "does not provide information
9 on the claimant's actual functioning, particularly given the lack of significant findings in objective
10 testing and the inconsistency with the treatment record." *Id.* However, the Ninth Circuit has held
11 that "[t]he report of a psychiatrist should not be rejected simply because of the relative imprecision
12 of the psychiatric methodology". *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (internal
13 quotations omitted). Further, the conclusions the ALJ challenges were taken from an interpretive
14 profile based on Plaintiff's results on "the MCMI-III, an objective test of psychiatric functioning."
15 AR at 1655; *see also Buck*, 869 F.3d at 1049 (clinical interviews "are objective measures"). It is
16 therefore not accurate to say that objective testing yielded no significant findings. As for
17 consistency with the treatment record, the Court directs the reader to its previous comments on
18 similar observations.

19 Accordingly, the wording of some of Dr. Wiebe's findings is not a legitimate basis on
20 which to discount Dr. Wiebe's opinion.

21 *h. Opinions of Other Doctors*

22 Besides Dr. Wiebe's report and the observations of non-psychiatric treatment providers,
23 discussed above, the medical record regarding Plaintiff's mental illness consists of the opinions of
24 one examining doctor (Dr. Martin) and two non-examining doctors (Dr. Amado, a consultant for
25 California's state benefits agency, and Dr. Peterson, a consultant engaged by the Social Security
26 Administration). The Court will review these opinions to determine what impact, if any, they may
27 permissibly have on the weight given to Dr. Wiebe's opinion.

28 1. Dr. Martin

1 Dr. Martin was a consulting examiner engaged by the Social Security Administration to
2 provide a mental status report for Plaintiff. AR at 2133. The examination was conducted in
3 March 2018. *Id.* Dr. Martin assessed Plaintiff with a number of “marked” limitations, including
4 completing a workday or workweek without interruptions and dealing with the usual stresses of a
5 competitive work environment. *Id.* at 2135. However, he assessed Plaintiff’s memory as
6 “adequate” based on a single test and said that her insight and judgment were “fair”. *Id.* at 2134.

7 The ALJ’s opinion began its discussion of Dr. Martin’s report by noting that Dr. Martin
8 examined plaintiff “in March 2018—well outside the period currently under consideration”. AR
9 at 2477. However, the “period under consideration” only ended on November 1, 2017, the date
10 when the ALJ previously determined that Plaintiff became disabled due to her physical condition.
11 The Ninth Circuit “has specifically held that medical evaluations made after the expiration of a
12 claimant’s insured status are relevant to an evaluation of the preexpiration condition.” *Lester*, 81
13 F.3d at 832 (internal quotations omitted). The Court sees no reason why the same principle should
14 not apply in the context of the date on which Plaintiff was found disabled based on non-
15 psychological conditions.

16 The ALJ’s opinion noted that, despite the lack of records to review, Dr. Martin “did not
17 perform any testing, and only conducted a Mental Status Exam and a ‘Complete Psychological
18 Evaluation’ This last, despite the capitalization, does not appear to be a recognized procedure
19 or test.” AR at 2477. Setting aside the question of why an “exam” and “evaluation” would not
20 qualify as “testing,” *Buck* makes clear that relatively imprecise tools, to include clinical
21 interviews, may constitute “objective evidence” of mental illness. The ALJ further noted that
22 Plaintiff’s score on the mental status exam was largely normal, *id.* at 2477; however, as previously
23 discussed, the presence (or even preponderance) of normal findings says nothing about whether
24 the *abnormal* findings indicate a disability. Finally, the ALJ cited Dr. Martin’s report that “the
25 claimant was cooperative, eye contact was fair, facial expression was normal” and concluded that
26 it was “thus entirely unclear how Dr. Martin came to the diagnoses or conclusions listed. It
27 appears to be based entirely on the claimant’s self-report of symptoms.” *Id.* However, “the rule
28 allowing an ALJ to reject opinions based on self-reports does not apply in the same manner to

1 opinions regarding mental illness.” *Buck*, 869 F.3d at 1049. Further, Dr. Martin noted that
2 Plaintiff exhibited a “bored” mood and restricted affect. AR at 2134. And, again, the ability to be
3 “cooperative” at a medical appointment does not necessarily translate to a lack of symptoms in a
4 higher-stress, lower-structure environment. *Id.* at 1945.

5 While the slightly out-of-date evaluation time and the opaque nature of Dr. Martin’s
6 conclusions might be grounds for discounting Dr. Martin’s opinion, the Martin report does not
7 contradict the Wiebe report to more than a marginal degree. “If anything, the similarity of their
8 conclusions provides reason to credit the opinions of both.” *Lester*, 81 F.3d at 832. In any event,
9 to the minimal extent that the opinions do conflict, the ALJ has not provided specific reasons for
10 crediting portions of Dr. Martin’s conclusions over those of Dr. Wiebe.

11 2. Dr. Amado

12 Dr. Amado, a non-examining consultant for a state benefits agency, found Plaintiff’s
13 mental illnesses to be “Non Severe” with only “Mild” limitations in the B criteria. AR at 1961–
14 62. Explaining this decision, Dr. Amado noted that Plaintiff “advances mostly physical
15 allegations”, “has never had specialty mental health care, and declined offer of psych meds in
16 primary care setting.” *Id.* at 1962. Dr. Amado said that the “only evaluation on file” was Dr.
17 Martin’s; there is no indication that Dr. Amado knew about the Wiebe evaluation. *Id.* Dr. Amado
18 said that Dr. Martin’s determination was “clearly over-restrictive when looking at the much more
19 benign MSE findings (no signs of major psychopathology) and mostly physical functional
20 limitations.” *Id.* The ALJ gave Dr. Amado’s admittedly “brief” opinion “substantial weight”
21 because it “accurately describes the state of the record and the clear inconsistency within the
22 consultative examination report.” *Id.* at 2479. This was error.

23 First, Dr. Amado did not “accurately describe the state of the record” before the ALJ in
24 that Dr. Amado appears to have been unaware of the Wiebe evaluation. Second, Dr. Amado’s
25 analysis appears to suffer from errors that this Court and the other judges in this matter have
26 identified in this and previous ALJ opinions: holding Plaintiff’s lack of mental health treatment
27 against her claims of mental illness and dismissing her mental health symptoms because Plaintiff’s
28 functional limitations are “mostly physical”. AR at 1945 (opinion of James, J.) (criticizing the

1 first ALJ for concluding that Plaintiff's limitations "appear chiefly related to her physical
2 conditions" without explaining the basis for that conclusion). And finally, while Dr. Amado
3 interpreted the results of Dr. Martin's exam as detecting no signs of major mental illness, "the
4 opinion of a non-examining medical advisor cannot by itself constitute substantial evidence that
5 justifies the rejection of an opinion of an examining or treating physician." *Morgan v. Comm'r of*
6 *Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999). Accordingly, Dr. Amado's contrary opinion
7 is not a legitimate ground for discounting Dr. Wiebe's opinion.

8 3. Dr. Peterson

9 The ALJ only partially credited the conclusions of Dr. Peterson, a consultant hired by the
10 Social Security Administration. The ALJ credited Dr. Peterson's characterization of the Wiebe
11 and Martin examinations as "overstatements and inconsistent with objective findings." *Id.* at
12 2479. However, the ALJ dismissed Dr. Peterson's conclusion that Plaintiff had moderate
13 limitations as "unsupported". *Id.* The ALJ concluded that "Dr. Peterson's assessment warrants
14 more weight than either Dr. Wiebe or Dr. Martin, but it does not warrant great weight. There is
15 simply too little evidence to demonstrate that mental impairments limited the claimant on a
16 continuous basis." *Id.* at 2480.

17 Like Dr. Amado, Dr. Peterson did not examine Plaintiff. AR at 2516. "An ALJ may reject
18 the testimony of an examining, but non-treating physician, in favor of a non-examining,
19 nontreating physician when he gives specific, legitimate reasons for doing so, and those reasons
20 are supported by substantial record evidence." *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir.
21 1995). Here, the reason the ALJ gave for crediting Dr. Peterson's opinion— inconsistency of the
22 Wiebe report with the objective findings—is not particularly specific. The Court also has
23 concerns about the legitimacy of this ground, as Dr. Peterson does not appear to have treated Dr.
24 Wiebe's clinical interview findings as "objective," which they are under *Buck*. Compare AR at
25 2520 (no "objective basis" for marked impairment for changes and stress) with AR at 1653, 1656
26 (Dr. Wiebe diagnoses Plaintiff with "severe anxiety" based on the Beck Anxiety Inventory, notes
27 "having a fear of the worst happening" as one of Plaintiff's symptoms, and opines based on
28 MCMI-III results that Plaintiff "may be apprehensive about trivial matters"). Further, Dr.

1 Peterson's testimony indicates a belief that Dr. Wiebe opined "marked difficulty for persistence"
2 without support in the record, *id.* at 2520, but Dr. Wiebe made no finding concerning persistence.
3 *Id.* at 1661–62.⁷ For these reasons, the ALJ failed to offer "specific and legitimate" grounds for
4 discounting Dr. Wiebe's analysis based on Dr. Peterson's.

5 In light of the foregoing, the ALJ provided no specific and legitimate reason supported by
6 substantial evidence for discounting Dr. Wiebe's conclusions.

7 INSTRUCTIONS ON REMAND

8 This case is a poster child for the proverbial "'heads we win; tails, let's play again' system
9 of disability benefits adjudication" which the Ninth Circuit's credit-as-true rule is designed to
10 avoid. *Garretson*, 759 F.3d at 1021–22. It has generated three ALJ opinions, each of which has
11 warranted a district court opinion reversing its decision for failure to properly consider Dr.
12 Wiebe's testimony. Although the first two judges to consider the issue declined to apply the
13 credit-as-true rule in the context of Dr. Wiebe's testimony, choosing instead to allow the ALJ to
14 reevaluate the record in light of their opinions, the ALJ's repeated errors in evaluating this
15 testimony have convinced this Court that it is appropriate to direct that Dr. Wiebe's testimony be
16 credited as true on remand. *See, e.g., Aparicio B. v. Comm'r of Soc. Sec.*, 2022 WL 799404, at *6
17 (N.D. Cal. Mar. 16, 2022).

18 Dr. Wiebe opined that Plaintiff had two marked limitations: in responding appropriately to
19 changes in a routine work setting or dealing with normal work stressors,⁸ which falls under
20 Criterion B4 (adapting or managing oneself), and in completing a normal workday and workweek

22 ⁷ To the extent that Dr. Peterson was speaking about Dr. Wiebe's finding of a marked limitation in
23 completing a normal workday or workweek without interruption from psychologically-based symptoms,
24 which is a component of the broader "Concentrate, persist, or maintain pace" paragraph B criterion, the
Court has already explained that some of Dr. Wiebe's findings describe symptoms that could cause such
interruptions.

25 ⁸ Dr. Wiebe selected both the "moderate" and "marked" boxes for the aptitude category of
26 "Respond appropriately to changes in a routine work setting and deal with normal work stressors". AR at
27 1662. However, "responding to demands; adapting to changes; [and] managing your psychologically based
28 symptoms" are categorized as Paragraph B(4) criteria. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. E, (4). And
for paragraph B4, "the greatest degree of limitation of any part of the area of mental functioning directs the
rating of limitation of that whole area of mental functioning." *Id.* at Pt. F, (3)(f). In other words, to the
extent that Plaintiff has a marked impairment in either responding appropriately to changes or dealing with
normal work stressors, she is considered to have a marked limitation in adapting or managing herself.

1 without interruptions from psychologically based symptoms, which falls under Criterion B3
2 (concentrating, persisting, or maintaining pace). AR at 1662. Accordingly, Plaintiff has a marked
3 limitation in two of the Paragraph B criteria. Further, Dr. Wiebe's clinical interview of Plaintiff
4 (and the medical record as a whole) documents that Plaintiff displayed six symptoms of
5 depression under Paragraph 12.04A: depressed mood, appetite disturbance with change in weight,
6 decreased energy, feelings of guilt or worthlessness, difficulty concentrating or thinking, and
7 thoughts of death. Because Plaintiff displays five or more Paragraph A symptoms and marked
8 limitations in two Paragraph B criteria, she meets Listing 12.04 for depressive disorder. Taking
9 Dr. Wiebe's report as true, the ALJ is required to find a disability at Step 3.

10 Accordingly, the Court will remand this matter for a determination of the date on which
11 Plaintiff first became disabled due to either her mental illness or a combination of mental illness
12 and other symptoms. That date should be no later than October 26, 2015, the date on which
13 Plaintiff was examined by Dr. Wiebe. "The onset date should be set on the date when it is most
14 reasonable to conclude from the evidence that the impairment was sufficiently severe to prevent"
15 Plaintiff from engaging in substantial gainful activity for a continuous 12 months or more. SSR
16 83-20. Because the date of onset will need to be inferred, the ALJ "should call on the services of a
17 medical advisor" to help make this determination. *Id.* The ALJ should also seek Plaintiff's
18 permission to obtain information from her family members about the course of her condition. *Id.*

19 CONCLUSION

20 For the reasons stated above, the court finds that the ALJ's decision was not supported by
21 substantial evidence. Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED IN
22 PART and Defendant's Cross-Motion is DENIED. This case is remanded for further proceedings
23 consistent with this order. A separate judgment shall issue.

24 IT IS SO ORDERED.

25 Dated: September 25, 2024



26
27
28 ROBERT M. ILLMAN
United States Magistrate Judge